

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

DAVID DURHAM,  
Plaintiff,

vs.

Case No. 1:18-cv-0091  
McFarland, J.  
Litkovitz, M.J.

JERRY NIFFENEGGER, et al.,  
Defendant.

**ORDER**

This matter is before the Court following an informal telephonic discovery conference held on March 2, 2022. For the reasons discussed at the conference, the Court orders as follows.

To the extent that plaintiff has noticed the March 7, 2022 discovery deposition of defendants' medical expert witness, Dr. James Hawkins, plaintiff is responsible for paying Dr. Hawkins's expert witness fee for the deposition pursuant to Fed. R. Civ. P. 26(b)(4)(E).

Plaintiff objects to paying Dr. Hawkins's expert witness fee for purposes of taking his deposition and made an oral motion to the Court to require defendants pay Dr. Hawkins's fee. Plaintiff argues that defendants' previous request to exclude plaintiff's counsel or representative from attending Dr. Hawkins's Fed. R. Civ. P. 35(a) independent medical examination (IME) and prohibit the video recording of the examination provides the impetus for plaintiff's deposition of Dr. Hawkins. *See* Doc. 89. Plaintiff asserts that because defendants caused plaintiff's need for the discovery deposition, this Court should order defendants to pay Dr. Hawkins's fee.

Defendants argue that plaintiff is obligated to pay Dr. Hawkins's fee for the discovery deposition. Defendants contend that because plaintiff was the party that noticed Dr. Hawkins's discovery deposition, Fed. R. Civ. P. 26(b)(4)(E) mandates plaintiff pay Dr. Hawkins's fee.

Under Fed. R. Civ. P. 26(b)(4)(E), this Court finds that plaintiff must pay Dr. Hawkins's fee for the March 7, 2022 discovery deposition. The Rule provides that "[u]nless manifest

injustice would result, the court must require that the party seeking discovery: (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D).” Fed. R. Civ. P. 26(b)(4)(E). Plaintiff has not cited, and the Court has not found, legal authority supporting the proposition that excluding plaintiff’s counsel or representative from attending the IME and prohibiting the video recording of the IME constitutes manifest injustice under Fed. R. Civ. P. 26(b)(4)(E) such that defendants should pay Dr. Hawkins’s fee.

Based on the foregoing, plaintiff’s oral motion to require defendants to pay Dr. Hawkins’s fee for the March 7, 2022 discovery deposition is **DENIED**.

**IT IS SO ORDERED.**

Date: 3/3/2022

  
Karen L. Litkovitz  
United States Magistrate Judge